The Illinois Commerce Commission is the administrative agency of the State of Illinois charged by the laws of said State (Ill. Rev. Stat., 1949, Ch. 111⅔, pars. 1-110.9) with the regulation of public utilities in that state, including those selling natural gas, and, as a matter of law (*In re Englehard & Sons Company,* 231 U. S. 646, 650-652; *New York City* v. *New York Telephone Company,* 261 U. S. 312, 315-316; *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587, 592), represents all Illinois consumers affected by the order in the case (some 60,000 consumers in 37 communities).

Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 131)* is reported at 181 F (2d) 833.

Jurisdiction.

The judgment and decree of the Court of Appeals was entered on July 15, 1950 (R. 131). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Question Presented.

Did the Court of Appeals conform to the mandate of this court in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577, when that court paid to respondent, Mississippi River Fuel Corporation, an interstate natural gas pipe line company, instead of to the ultimate consumers of the gas, the major portion of the fund impounded as the result of an unsuccessful attack on an FPC order reducing rates of Mississippi's suppliers?

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* Record references are to the printed record.

Statutes Involved.

Sec. 1(b), Natural Gas Act [52 Stat. 821 (1938); 15 U. S. C. § 717(b) (1946)]:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The provisions of the Illinois statutes hereinafter discussed are printed in Appendix A.

Statement of Facts.

On April 27, 1943, the Federal Power Commission ordered a reduction in the rates of Interstate Natural Gas Company (Interstate). Pending review, the court below stayed that order and required Interstate to deposit monthly the excess of the old over the new rates in the registry of the court. The stay order was in effect from June 1943 to October 1947. After affirmance of the Commission order (156 F. (2d) 949 and 331 U. S. 682) the court below first directed that the impounded funds be distributed to Interstate's direct customers (166 F. (2d) 796). Three interstate pipeline companies, including Mississippi River Fuel Corporation (Mississippi), were Interstate's only direct customers. Mississippi and Interstate during the time in which the fund was accumulated were affiliated in that Standard Oil Company of New Jersey owned 54% of the stock in Interstate and 22.5% of the stock in Mississippi. Mr. Frank H. Lerch, Jr., was president of both

companies. (See Record, pp. 250-254 in *Interstate Natural Gas Company* v. *Federal Power Commission,* No. 733, October Term, 1946.)

On certiorari to review that order this Court reversed and remanded the case to the court below with directions. *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577 (1949).

After the mandate came down, Mississippi submitted to the Court of Appeals a plan for distribution of $1,484,582.53 which was a portion of the impounded fund allocable to sales from Interstate to Mississippi (R. 1). Of this sum Mississippi claimed $244,103.70 on the ground that it had already reduced its rates to its public utility customers by a like amount (R. 8).[1] It admitted that an additional $300,898.66 should be paid to its public utility customers (R. 16),[2] but asserted that it should be allowed to keep the remaining $939,580.17 because it computed that amount as the difference between the old and new Interstate rates as

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[1] Mississippi had not reduced its rates specifically because of the Interstate rate reduction. In 1945 the Federal Power Commission ordered Mississippi to reduce its rates to public utility customers, effective January 20, 1946 (4 F. P. C. 340). The order further directed that in addition to the reduction then ordered, Mississippi should reduce its rates whenever the Interstate order, then in litigation, became final. It was estimated that the Interstate order would reduce Interstate's rates to Mississippi by $301,329 (4 F.P.C. 340, 363). This Mississippi rate order was appealed but not stayed, and the Court of Appeals for the District of Columbia reversed because the findings in the order were insufficient. *Mississippi River Fuel Corporation* v. *Federal Power Commission,* 163 F. (2d) 433. To settle the case and Mississippi's claim that its expenses had risen to the point that it needed a rate increase, the Federal Power Commission and Mississippi, after the case was remanded by the Court of Appeals, agreed that Mississippi's rates from January 20, 1946, to October 1, 1947, the month in which the Supreme Court upheld the Interstate order, should be raised somewhat but that Mississippi should pass on the part of the Interstate reduction applicable to sales to public utility companies. The demand charge was fixed at $1.00 per month per mcf for the period January 20, 1946, to October 1, 1947, and at $1.12 thereafter (R. 112-115).

[2] These public utility customers in turn have renounced all claims to this sum, which is to be passed on to the ultimate consumers who are their customers.

applied to the quantities of gas sold by Mississippi to its direct customers. All these amounts were computed simply by applying the difference between the old and new Interstate rates to the volumes of gas sold by Mississippi to the two classes of its customers, viz., public utility companies for resale to ultimate consumers and ultimate consumers themselves (R. 8-9).

The Federal Power Commission had found in its 1945 Mississippi rate order that a fair rate of return for Mississippi was six per cent and that it was earning more than this rate on sales regulated by that commission as well as on sales not so regulated.[3] 4 F. P. C. 340. The rates for interruptible service to ultimate consumers purchasing directly from Mississippi ranged from 54 to 68% of the rates for firm service to Mississippi's public utility customers, and the rates for firm service to its consumer customers were only about 80% of the rates for firm service to its public utility customers.[4]

On March 2, 1950, an order to show cause why the fund should not be distributed according to the plan proposed by Mississippi was directed against all interested parties,

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[3] By the terms of Section 1(b) of the Natural Gas Act, the Federal Power Commission can regulate only sales to companies which in turn will resell the gas. Mississippi sells gas to respondent companies and other companies which consume the gas themselves rather than reselling. Such sales have been held to be beyond the jurisdiction of the Federal Power Commission. See *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635, 646-647 (1945).

[4] These computations were made from the figures in the excerpt from Mississippi's prospectus, which shows both the volumes of gas sold to and the revenues derived from the various classes of customers from 1943 through 1948 (R. 89). A table of the average rates per mcf, 1943-1946, follows:

	1943	1944	1945	1946
Utility Firm	25.8¢	26.0¢	26.2¢	20.7¢
Industrial Firm	21.4¢	21.6¢	21.5¢	21.2¢
Interruptible	15.2¢	14.7¢	14.2¢	14.0¢

Interruptible service to utilities was of negligible quantity. The differences in rates are slightly overstated because gas was delivered to the industrial customers at a pressure which was only 99% as high as the pressure at which was delivered to the public utilities.

including, for the first time, the consumer customers of Mississippi (R. 40). Certain of these customers disclaimed any share or failed to answer (R. 24). Those who are respondents to this petition filed claims totalling $467,618.79 (R. 44, 46, 52, 54, 59, 62, 69, 78, 80, 81, 83), computed on the basis above described.

The Federal Power Commission and the Missouri Public Service Commission denied any jurisdiction over Mississippi's sales to its consumer customers (R. 14, 26). The Illinois Commerce Commission in the meantime[5] had cited various interstate pipeline companies, including Mississippi, to show cause why their direct sales to industrial consumers in Illinois did not bring them under its jurisdiction (R. 5[illegible], although the Commission had held early in 1949 that Mississippi's sales were not subject to its jurisdiction (R. 28). This Commission contended that the fund, with the exception of whatever amount Mississippi had passed on to its customers through rate reductions, should be paid to the ultimate consumers, either those buying directly from Mississippi or the customers of Mississippi's public utility customers, but in any case should not be paid to Mississippi.

The Court of Appeals approved the Mississippi plan in its entirety and ordered that the entire amount which Mississippi had allocated to sales to contract customers should be paid to Mississippi (R. 140, 143).

Specifications of Error.

The Court of Appeals erred:

1. In holding that under this Court's opinion in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577, Mississippi was entitled to any portion of the fund except that which was equal to the amount by

[5] On February 8, 1950.

which Mississippi had reduced its rates to its public utility customers;

2. In apportioning the fund according to the volumes of gas which the various classes of Mississippi's customers had consumed;

3. In deciding the rights of the industrial customers under Illinois law on the sole authority of an order of the Illinois Commerce Commission dated January 14, 1949, without attempting an interpretation of the Public Utilities Act of Illinois, which no Illinois court had construed on this point.

REASONS FOR GRANTING THE WRIT.

I. The decree of the Court of Appeals fails to carry out the mandate of this court and should be corrected.

The court below, in holding that as a matter of law Mississippi was entitled to the $939,580.17, misconstrued this Court's opinion in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577 (1949), and failed to conform to its mandate.

1. This Court made it clear that the immediate purchasers from Interstate could share in the fund only if their own rates had been so low that they were not earning a reasonable return, or if they had passed the rate reductions on to their customers.[6] That Mississippi's rates were

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[6] "The pipe-line companies in their petitions for intervention make no claim that their rates have been so low that they are entitled to these refunds as a matter of law * * * Moreover, if the pipeline companies passed on to their customers the rate reductions from the date of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from these exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund." 336 U. S. 577, 582.

Somewhat the same opinion was also expressed in the following language:

"Whether the three purchasers or the intervening distributors are entitled to any part of the reduction depends upon the ascertainable condition of the three purchasers from Interstate and the intermediate purchases from them." 336 U. S. 577, 586-587.

high enough—in fact, too high from 1943 to 1946—is demonstrated by the Federal Power Commission's order of November 9, 1945, finding that Mississippi was earning more than a fair rate of return on all its business and ordering it to reduce its rates to its public utility customers and further to reduce its rates whenever the Interstate order should be upheld in court (4 F. P. C. 340),[7] nor is it contended that any of the $939,580.17 was passed on to Mississippi's customers.

Only in the opinion of Mr. Justice Jackson is there any language to indicate that the members of the Court contemplated giving a part of the fund to the intermediate pipe-line companies because some of the ultimate consumers were their contract customers. The only statement made by the Court which touches on the sales to these consumers[8] followed a sentence stating expressly that it was considering distribution to other than the pipe-line companies.[9] Yet the Court below based its decision on the fact that Mississippi had sold large quantities of gas to contract customers who had not sought reduced contract rates during the period in question.[10]

The Court of Appeals adopted a premise almost diametrically opposed to that of this Court. Despite the language of this Court limiting the right of the intermediate pipeline companies to the fund, the Court of Appeals started from the premise that they had a *prima facie* right to it,

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[7] This order was set aside only because its findings were insufficient, not because the Commission had been wrong on the merits. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, *supra*, note 1.

[8] "We likewise do not know whether the reductions would have reached the industrials either by terms of the contracts or by virtue of the assertion of regulatory authority" 336 U. S. 577, 583.

[9] "The problem is somewhat more complicated if distribution of the fund is to be made to claimants other than the pipe-line companies." *Ibid.*

[10] *Interstate Natural Gas Company* v. *Federal Power Commission*, 181 F. (2d) 833, 835 (1950).

and that any other claimants had the burden of showing superior claims to it. *Interstate Natural Gas Company* v. *Federal Power Commission*, 181 F. (2d) 833, 836-837 (1950). The Court then proceeded on the theory that superior claims could be shown only by demonstrating that the claimant would have received the fund had no stay order been entered. Since it was almost impossible to show with any certainty what would have happened had no stay order been entered, the position of the court resulted in making it virtually impossible for any claimant, other than Mississippi, to establish a right to the fund.

2. The opinions, save that of Mr. Justice Jackson, indicate that the fund should be distributed according to equitable principles,[11] because the Court of Appeals has jurisdiction to distribute the fund only because it is the equity court which caused accumulation of the fund.[12]

The Court further suggested that the fund should be distributed to those persons who would have obtained it had there been no stay order entered. This conclusion, however, was apparently based on the assumption that such distribution would be in accordance with equitable principles. If, in fact, such distribution would not do equity, the assumption would be unwarranted and some equitable plan of distribution would have to be developed. To determine whether the distribution satisfies equitable principles all of the circumstances and the claims of the various individuals and groups involved must be considered. We submit that

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[11] "It (the Court of Appeals) assumes the duty to make disposition of the fund in accord with equitable principles" p. 582.
"Reasons of equity produced the fund; equitable considerations must govern its distribution" p. 586.
"Nothing short of this will accord with the congressional purpose or with equitable principles by which the court must be governed in administering the fund" p. 598.

[12] The Court relied on *United States* v. *Morgan*, 307 U. S. 183 (1939); *Inland Steel Company* v. *United States*, 306 U. S. 153 (1939); and *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U. S. 301 (1935).

any plan that allows Interstate's affiliate, which itself during most of the period when the impounded fund was accumulated was earning excessive profits, to keep the major portion of this fund is not in accord with equitable principles. In these circumstances to give Mississippi any share in the fund would result in a windfall to Mississippi, unjustly enrich it and its parent company, and truly make the Federal Power Commission's rate order of April, 1943, an exercise in futility.[13]

A more equitable plan has been used in other cases where it was necessary to distribute funds impounded during gas rate cases. In *Natural Gas Pipeline Company* v. *Federal Power Commission*, 131 F. (2d) 137 (CCA 7, 1942) the Court ruled that industrial consumers and consumers using gas for heating purposes should not receive any of an impounded fund, because they had paid much lower prices for their gas than had the other users—chiefly domestic users for cooking purposes—and that the latter should receive the fund. *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138 (1945) did not disapprove this part of the court's plan but only held that when a purchaser for resale could show some equitable consideration entitling it to a portion of the fund, that portion should be awarded to it.[14]

A slight modification in this plan was made by the United States Court of Appeals for the Eighth Circuit during litigation over the rates of Panhandle Eastern Pipe Line Company when the court adopted the recommendation of a spe-

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[13] Such a result would be ironic in view of the fact that this Court has many times declared that the purpose of the Natural Gas Act was to protect the ultimate consumers. See *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610, 612 (1944); *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U. S. 507, 520 (1947); *Federal Power Commission* v. *Interstate Natural Gas Company, supra*, at p. 581.

[14] See Mr. Justice Frankfurter's reference in his opinion in the *Interstate* case, 336 U. S. 577,, 586.

cial master in chancery that the A. P. Green Brick Company, an industrial user, be allowed to participate in an impounded fund because it had paid rates which gave the utility a substantial return on its investment.[15] *The court ruled similarly on the distribution of another portion of the fund in the area of Battle Creek, Michigan.*

Apart from these exceptions, it has not been doubted by the states which have had to make distributions of impounded funds that the distribution to domestic and smaller commercial consumers to the exclusion of low-rate-paying industrial consumers was the most equitable way to distribute such funds.[16] *The cases above mentioned, of course, involved only one interstate pipe-line company, intermediate local public utility companies and the ultimate consumers who were customers of those local public utility companies. The equities, however, are not changed by the introduction of another intermediate company (an interstate pipe-line company) except that now, instead of examining the earnings and condition of one intermediate company to determine whether or not there were equitable considerations which would entitle it to the fund, the court must examine the earnings and condition of two intermediate companies. In the instant case the intermediate com-*

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[15] C. A. 8th, No. 12,466, order filed on August 30, 1947. The master's report was filed on July 17, 1947.

[16] *Proceedings at 61st Annual Convention of the National Association of Railroad and Utilities Commissioners* (1949), address by John Randolph, Member of Missouri Public Service Commission, 483, 489. See also statement on page 15 of the Brief for the Federal Power Commission Submitted to the Court below in the instant case (R. ....). The reason there given was that the industrial consumers would not have obtained any reduction in rates from the reduction in the cost of gas to the local utility. Generally the failure to obtain such reduction has been due to the fact that the rates for such utilities had covered little more than the incremental cost of giving such service rather than a proportionate share of fixed and variable costs. These rates have been held down to this level by the prices of competitive fuels. The state commissions, when they have had refunds or reductions to pass on to consumers, naturally enough have refused shares to customers already benefiting by such rates.

issues at the level of legal interpretation have specifically disclaimed any right to the fund. The customers of the other intermediate company, Mississippi, were found to be equally free by the Federal Power Commission. 1 F. P. C. 340.

Under such a rule those ultimate consumers who purchased directly from Mississippi at rates covering their proportionate shares of the costs would be entitled to recover part of the fund, unless they were excluded on other grounds. If for any other reason they were excluded, their shares should go to the higher rate paying utility customers to be passed on to ultimate consumers. Those ultimate consumers purchasing directly from Mississippi at rates not covering their proportionate costs would not be entitled to any part of the fund, and, again, the part now attributed to sales to them would be awarded to the higher rate paying utility customers to be passed on to ultimate consumers.

8. The Court of Appeals made a further error in its summary determination that those of Mississippi's direct customers who are located in Illinois could not have secured rate relief under the Illinois Public Utilities Act. This determination was based on an order of the Illinois Commerce Commission dated January 14, 1949 (77 P. U. R., N. S., 12), in which this Commission decided on the basis of Mississippi's representations as to its operations in Illinois that the Commission had no jurisdiction over Mississippi's sales to its direct customers. The court below adopted this determination apparently on the theory that the order indicated how this Commission would have acted had no stay order been entered in the Interstate case.

That order was entered before the problem of distributing this fund arose, and as a consequence, none of the contract customers opposed Mississippi's contention that the Illinois Commission had no jurisdiction over its sales.

Supp. even urged the same contention. Had the stay order not been entered and had there been some hope of immediate reduction in rates, their position might have been affected and the Commission would have had the benefit of argument from both sides. Furthermore, since the Commission's interpretation could not have been final, the contract consumers might have appealed an adverse Commission order to the Illinois courts in order to obtain an authoritative construction.[17]

The Illinois courts have never interpreted the Illinois Public Utilities Act on this point. In such a situation the court below should have examined the state law itself to determine the correct interpretation of the Illinois Public Utilities Act. That statute gives broad enough powers to the Illinois Commerce Commission to raise a substantial likelihood that it has jurisdiction in such cases.[18] *Significantly the Illinois Commerce Commission has thought the question worthy enough of further consideration to cite three pipe-line companies, including Mississippi, to show cause why their sales to contract customers should not be fully regulated by the Commission.*[19] *That proceeding is presently pending before this Commission with hearings not yet completed. That fact was brought to the attention of the court below. To conform to this Court's mandate in the Interstate case, the Court of Appeals should have*

[17] Ill. Stat. 1949, Ch. 111-2/3, Pars. 72, 73.

[18] Section 8 of the Public Utilities Act (Ill. Rev. Stat. 1949, Ch. 111-2/3, par. 81) gives the Commission general supervision over all public utilities. Section 10 (Ill. Rev. Stat. 1949, Ch. 111-2/3, par. 10) includes in the definition of a public utility a company which owns property for conveyance of oil or gas by pipe line. Sec. 41 (Ill. Rev. Stat. 1949, Ch. 111-2/3, par. 41) gives the Commission power to fix rates of public utilities. Sec. 72 (Ill. Rev. Stat. 1949, Ch. 111-2/3, para. 76) gives the Commission power to order reparations for overcharges provided complaint is made to the Commission within one year of the overcharge.

[19] *Illinois Commerce Commission v. Mississippi River Fuel Corporation*, Ill. C. C. Docket No. 38143.

made its own determination as to the law of Illinois in this regard.

4. The decision of the Court of Appeals once again puts a premium on the litigation of rate orders. If, as here, the primary pipe-line company has an affiliated vendee pipe-line company which in turn sells the gas, litigation and impounding with ultimate distribution to the affiliate will be almost as profitable as the primary company's winning the rate litigation itself. The company has everything to gain from litigation and nothing to lose. No company could refuse to litigate a rate order in such a situation.

II. The question involved is an important one in the Administration of the Natural Gas Act.

It is submitted that it is essential that the question here involved should be settled and the rights of ultimate consumers of natural gas in impounded funds be determined. Inter-connection between primary gas pipe lines and secondary gas pipe lines are becoming more numerous; indeed, the creation of secondary gas pipe-line companies affiliated with the primary gas pipe-line companies will be greatly encouraged by the decree of the Court of Appeals. Rate cases under the Natural Gas Act will continue to involve large sums of money and many parties. By granting the writ of certiorari on the prior petition this Court recognized the importance of settling these problems. This petition rests on the same foundation as the first. Cf. *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U. S. 781 (1929); *Arkadelphia Milling Company* v. *St. Louis-Southwestern Railway Co.*, 249 U. S. 134 (1918).

CONCLUSION.

The Court of Appeals for the Fifth Circuit failed to carry out this Court's mandate in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577. By assuming that Mississippi has a *prima facie* right to the fund, the Court below entered exactly the same order as it did before, except insofar as Mississippi consented otherwise, despite the fact that this Court set aside the previous order. For the reasons stated above the writ of certiorari should be granted to give effect to the prior mandate of this Court.

Respectfully submitted,

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APPENDIX A.

Ill. Rev. State. 1949, Ch. 111⅔, par. 8.

"The Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the Commission and with the charter and franchise requirements."

Ill. Rev. Stat. 1949, Ch. 111⅔, par. 10.

"The term 'public utility,' when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever . . . that now or hereafter:

"(a) May own, control, operate, or manage, within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used . . . for the conveyance of oil or gas by pipe line; . . ."

Ill. Rev. Stat. 1949, Ch. 111⅔, par. 41.

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, . . . are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates

or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

"The Commission shall have power, upon a hearing had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof. . . ."

Ill. Rev. Stat. 1949, Ch. 111⅔, par. 76.

"When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

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"All complaints for the recovery of damages shall be filed with the Commission within one year from the time the produce, commodity or service as to which complaint is made was furnished or performed, . . ."